INTERIOR BOARD OF INDIAN APPEALS

Estate of Ronald Richard Saubel

9 IBIA 94 (10/28/1981)

Also published at 88 Interior Decisions 993

Related Board case:
9 IBIA 136

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF RONALD RICHARD SAUBEL

IBIA 80-46 Decided October 28, 1981

Appeal from order by Administrative Law Judge reopening estate and redetermining heirs.

Reversed and remanded.

1. Indian Probate: Wills: Disapproval of Will

   Under the Supreme Court's holding in Tooahnippah v. Hickel, 397 U.S. 598 (1970), the Department may not revoke or rewrite an otherwise valid will disposing of Indian trust or restricted property that reflects a rational testamentary scheme simply because the disposition does not comport with the deciding official's conception of equity and fairness.

2. Indian Probate: Wills: Failure to Mention Child

   The failure of decedent's will to provide for two after-born children is insufficient to render the dispositive scheme irrational.

APPEARANCES: Elizabeth Anne Bird, Esq., for appellants Ronette Saubel, Ronald Richard Saubel, Jr., Antoinette Saubel, and Desmond Saubel;

Isabel Uribe for Ronald Richard Saubel, Jr., appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

This is an appeal from an order redetermining heirs after reopening entered by Administrative Law Judge William E. Hammett on May 5, 1980. Appellants are Ronette Saubel, Ronald Richard Saubel, Jr., Antoinette Saubel, and Desmond Saubel, the four minor children of Ronald Richard Saubel, deceased Palm Springs Allottee No. 26, and his wife, Sally Del Rio Saubel. Appellant children maintain first, that it was error to reopen the estate. Second, they contend it was error to limit the hearing to whether the son of Isabel Uribe, also named Ronald Richard Saubel, Jr., is an illegitimate son of the decedent entitled to share in the decedent's trust estate pursuant to the provisions of 25 U.S.C. § 371 (1976). Appellants submit that the decedent left a valid final will and testament upon his death which expressly omits Ronald Richard Saubel, Jr., son of Isabel Uribe, as a beneficiary of his estate, and that this testamentary wish of the decedent must be upheld by the Department in this probate proceeding.

Background

Ronald Richard Saubel was born on April 30, 1943, and died in Banning, California, on April 3, 1977. He was a Palm Springs allottee

under the jurisdiction of the Palm Springs Agency, Palm Springs, California.

A hearing to determine heirs was held on May 1 and 22, 1978, by Administrative Law Judge S. N. Willett. Testimony at that hearing disclosed that decedent married Sally Del Rio on March 15, 1965, and had four children of that marriage: Ronette Rhonda, born September 15, 1966; Ronald Richard, Jr., born September 13, 1968; Antoinette Flora, born August 29, 1974; and Desmond Damon, born September 21, 1975.

On May 13, 1964, decedent executed a will devising all of his property to certain of his collateral relatives. In 1973 decedent was hospitalized for a serious illness, and on January 28, 1973, he composed a holographic will leaving all of his property to Ronette and Ronald, Jr., the only two of his children then living. A third will, prepared for decedent by his aunt's attorney, was signed on February 1, 1973. This will expressly revoked all prior wills and again left all decedent's property to his two children. Decedent's wife was expressly omitted from taking under this will. 1/ Another provision of the February 1973 will sought to disinherit Ronald Richard Saubel, Jr., allegedly the illegitimate son of decedent and Isabel Uribe. There

_____

1/ The testimony showed that Sally Del Rio was not Indian and had agreed with decedent that his trust property should descend directly to their children so that it would not lose its status as Indian trust land.

was evidence that a fourth will had been prepared for decedent subsequent to February 1, 1973, which included all four of his children born to Sally Del Rio Saubel. This purported will was never signed by decedent. 2/

Following the hearing, Judge Willett issued a memorandum and order on July 6, 1978. The order found that the February 1, 1973, will was technically valid and was decedent's final will. However, it also found that because the will made no provision for decedent's two youngest children and because the evidence indicated that decedent had equal concern and affection for all four of his children borne by Sally Del Rio Saubel, it did not establish a rational testamentary scheme. Therefore, Judge Willett disapproved the will.

Despite the disapproval of the testamentary provisions of the will, Judge Willett held that the clause revoking all earlier wills and codicils was effective to revoke decedent's 1964 will. 3/ Thus, she held that decedent had died intestate and ordered distribution of

_____

2/ See Transcript of Hearing held May 22, 1978, at 8.

3/ Judge Willett's order does not consider the validity of the Jan. 28, 1973, holographic will. Decedent's holographic will, which also failed to provide for two of his children born to Sally Del Rio Saubel, would similarly not reflect a "rational testamentary scheme" under the rationale of the order.

one-fourth of the estate to each child of Sally Del Rio Saubel with a one-third life estate to decedent's spouse. 4/

On July 3, 1979, Isabel Uribe, acting on behalf of her minor son, Ronald Richard Saubel, Jr., petitioned to reopen the estate on the grounds that her child, who was not represented at the hearings before Judge Willett, was the illegitimate son of the decedent and was entitled to share in the estate under 25 U.S.C. § 371 (1976). The petition was assigned to Administrative Law Judge William E. Hammett, who, on October 16, 1979, ordered that the estate be reopened for the sole purpose of determining whether this child was the decedent's son. 5/

Following a November 20, 1979, hearing, Judge Hammett entered an order on May 5, 1980, finding that Isabel Uribe's child was the decedent's son and ordering that the estate be distributed in five equal shares to decedent's one illegitimate and four legitimate children, subject to Sally Dal Rio Saubel's one-third life estate. Decedent's legitimate children appealed from this order.

_____

4/ This distribution was based on California intestacy laws (see 25 U.S.C. § 348 (1976)) and a second disclaimer of interest signed by Sally Dal Rio Saubel on May 22, 1978.

5/ Judge Hammett limited the hearing to this one issue on the grounds that a broader hearing would constitute an improper collateral attack on Judge Willett's order.

Discussion, Findings, and Conclusions

This case is technically before the Board on an appeal from the order reopening the estate and holding that only the question of the paternity of the child of Isabel Uribe would be considered. However, under 43 CFR 4.320 (1980), appearing in the Board's revised procedural rules at 46 FR 7334, 7336 (Jan. 23, 1981)), the Board is not limited in its review of probate decisions by the arguments raised by the parties, but "may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate." Such an error appears on the record in this case.

Under 25 U.S.C. § 373 (1976) an Indian may dispose of trust property by will in accordance with regulations prescribed by the Secretary of the Interior. The regulations promulgated pursuant to section 373, found in 43 CFR Part 4, Subpart D, deal almost exclusively with the mechanics of executing and proving a will, the administration of the estate, and the conduct of probate hearings.

[1] The Supreme Court considered the scope of the Secretary's power to disapprove an Indian will under section 373 in Tooahnippah v. Hickel, 397 U.S. 598 (1970). Although the Court declined to explore the full extent of the Secretary's power, it held that the Secretary or his representative could not revoke or rewrite an otherwise valid will that reflected a rational testamentary scheme simply because the disposition did not comport with the approving official's conception

of equity and fairness. See Estate of William Mason Cultee, 9 IBIA 43 (1981); Estate of Dorothy Sheldon, 7 IBIA 11, 85 I.D. 31 (1978); Estate of Anthony Bitseedy, 5 IBIA 270 (1976); Estate of Gerald Martinez, Sr., 5 IBIA 162, 83 I.D. 306 (1976).

In disapproving the decedent's will in this case the Administrative Law Judge found that the will did not reflect a rational testamentary scheme because it failed to mention decedent's two youngest children. In essence, the Administrative Law Judge's decision is an attempt to fill a gap in Federal Indian probate law. Under 25 U.S.C. § 348 (1976) the Department looks to state intestate succession laws in determining the legal heirs of an Indian who dies without having executed a will. There is no similar statutory or regulatory provision for applying state laws regarding the construction of wills. The only Federal regulations in this area concern lapse (43 CFR 4.261) and the felonious taking of the testator's life (43 CFR 4.262). Thus, when faced with a problem of pretermitted children (or of a pretermitted spouse, advances, or ademption), the Department is generally required to approve the will as written. It is difficult to perceive how the disinheritance of a child born after the execution of a will may be considered irrational or contrary to public policy when no policy has been articulated through either statute or regulation. 6/

_____

6/ We agree, therefore, with the following dictum expressed by Judge Willett at page 7 of her July 6, 1978, opinion:

[2] The evidence in this case does not disclose the testamentary scheme established in decedent's will to be irrational. On the contrary, the plan shows careful consideration and could be considered reasonable in light of decedent's personal circumstances. The fact that two children were born to decedent after the execution of this will is insufficient to render the dispositive scheme irrational. 7/ Therefore, decedent's February 1, 1973, will should not have been disapproved on the grounds that it evidenced an irrational testamentary scheme.

_____

fn. 6 (continued)

"The rights of omitted or pretermitted heirs is one of the many substantive issues in Indian probate for which no express provision has been made. It is incongruous that the Federal government has not yet addressed this problem which has been universally acknowledged and dealt with by the states through the enactment of special statutes. Indian probate proceedings are deprived of the valuable device which permits an overall testamentary scheme to be upheld through the validation of a will as to the beneficiaries and the world at large while at the same time permitting the participation of omitted heirs in the estate to the extent of an intestate share." To the above dictum we would add that the Supreme Court has suggested that it is within the authority of the Secretary of the Interior to promulgate substantive regulations to govern the devise of Indian trust lands. In Tooahnippah, supra at 610, Chief Justice Burger observed: "The Secretary's task [in approving or disapproving Indian wills] is not always an easy one and perhaps is rendered more difficult by the absence of regulations giving guidelines." In a concurring opinion, Justice Harlan stated: "I do not mean to suggest that the Secretary might not promulgate a regulation that, like certain state statutes, provides that a testator cannot completely disinherit any of his offspring. A general standard like this would, of course, eliminate the dangers inherent in ad hoc determinations of whether the will is in some vague sense fair to an heir." Id. at 619 n.10.

7/ The evidence suggests that a new will had been prepared for decedent that was identical to the February 1973 will except that it provided for equal distribution to all four of decedent's natural children. Decedent failed to execute this document. Despite some evidence that decedent was generally lax in attending to certain business matters, any finding as to his motivation for failing to execute the will would be purely conjectural. It is as possible that he intentionally failed to sign the new document as that he merely procrastinated too long and the omission was inadvertent. See Estate of William Mason Cultee, supra.

It is possible, however, that the will dated February 1, 1973, should not be approved for other reasons. Ronald Richard Saubel, Jr., the son of Isabel Uribe, was not present at the hearings before Judge Willett, not having been furnished notice of the proceedings, and was limited by Judge Hammett to establishing that decedent was his father. He has thus not had an opportunity to present any arguments he may have against approval of the will. The case must, therefore, be remanded to the Hearings Division. 8/

Pursuant to the authority vested in the Board of Indian Appeals by 43 CFR 4.1, the Order Disapproving Will and Determining Heirs is reversed. The Order Redetermining Heirs After Reopening is modified by striking that part of the order distributing decedent's estate but retaining all findings and conclusions establishing Ronald Richard Saubel, Jr., to be decedent's illegitimate son. The case is remanded to the Hearings Division for further action not inconsistent with this decision.

//original signed
Wm. Philip Horton
Chief Administrative Judge

I concur:

//original signed
Franklin D. Arness
Administrative Judge

8/ On remand it is suggested that the two older children and the two younger children of decedent and Sally Del Rio Saubel be represented by separate guardians ad litem because their interests are potentially conflicting.

ADMINISTRATIVE JUDGE MUSKRAT CONCURRING:

I concur with the majority in overruling the Administrative Law Judge's decision of July 6, 1978, and with the order remanding for a new hearing. To that holding I offer some additional analysis and rationale for I consider this case significant in that it raises for Indian probate the classic problems of subsequent-born children and pretermitted heirs.

At the initial hearings on May 1 and 22, 1978, the Administrative Law Judge faced a dilemma for which there presently exists no satisfactory solution. Because of the absence of Departmental regulations regarding pretermitted heirs, she was forced by the apparent unfairness of the decedent's omission of his two younger children to "destroy the will in order to save it." Unfortunately, such an approach creates more problems than it resolves.

In her decision of July 6, 1978, the Administrative Law Judge disapproved an Indian will under the authority of 25 U.S.C. § 373 (1976) for the reason that the testator's failure to provide for two subsequent-born children rendered the will's testamentary scheme irrational. 1/ In so exercising the authority of the Secretary of

_____

1/ According to the Administrative Law Judge: "the February 1, 1973 will of the decedent should and may properly be disapproved to insure the participation of the afterborn, minor children in the testator's estate." (See opinion of July 6, 1978, at 16.) In all other respects the will of February 1, 1973, appeared "rational" in that it provided for the wife, existing legitimate children, and the illegitimate son of the testator--i.e., his "natural heirs."

the Interior under section 373, the Administrative Law Judge relied upon the decision of the United States Supreme Court in Tooahnippah v. Hickel, 397 U.S. 598 (1970), and in particular upon the concurring opinion of Justice Harlan. In Tooahnippah, supra, the Supreme Court reviewed the Secretary's authority to approve Indian wills under 25 U.S.C. § 373 (1976) and provided the analytical model for subsequent judicial review of Secretarial actions and for Secretarial review of the actions of subordinate officials. Although the Administrative Law Judge was thus correct in relying on Tooahnippah, supra, she nevertheless erred in her application of its principles.

In her decision of July 6, 1978, she misread and misapplied a point made by Justice Harlan in footnote 9 of his concurrence.

> Moreover, under Tooahnippah v. Hickel, disapproval of a will for the benefit of afterborn minor children appears to be sanctioned as a reasonable exercise of the discretionary authority contained in 25 U.S.C. § 373. See n.9, Tooahnippah v. Hickel, 397 U.S., supra, at p. 618.
>
> On the basis of these factors, the February 1, 1973 will of the decedent should and may properly be disapproved to insure the participation of the afterborn, minor children in the testator's estate.

(Opinion of July 6, 1978, at 16).

A closer look at footnote 9 of Justice Harlan's concurrence, however, reveals that it was merely an explanatory note indicating that the opinion of the Regional Solicitor in the case then before the Court

cited three unreported decisions in support of his (the Regional Solicitor's) claim of his right, in resolving whether or not to approve an Indian will, to determine whether the will achieves a just and equitable result. The three cases cited involved the disinheritance of minor children whom the decedents were obligated to support at the time of their deaths and two of the cases involved the disinheritance of children born after the execution of a will. The mere recitation of the facts of those cases in footnote 9 does not constitute an endorsement of the proposition that an Indian will can be disapproved and set aside because the reviewing official finds that the will in question, by disinheriting subsequent-born children, is unjust and inequitable.

Rather than relying on footnote 9, the Administrative Law Judge should more properly have relied on the analytical criteria described by Justice Harlan in the text of his concurrence. Accordingly, Justice Harlan sets out three standards to be considered in exercising the Secretary's approval authority under section 373:

> A will that disinherits the natural object of the testator's bounty should be scrutinized closely. If such a will was the result of overreaching by a beneficiary, or fraud; if the will is inconsistent with the decedent's existing legal obligation of support, or in some other way clearly offends a similar public policy; or if the disinheritance can be fairly said to be the product of inadvertence--as might be the case if the testator married or became a parent after the will was executed--the Secretary might properly disapprove it. However, I do not think the Secretary can withhold approval simply because he concludes it was unfair of the testator to disinherit a legal heir in circumstances where as here there is a perfectly understandable and rational basis for the testator's decision. [Emphasis added.]

(Tooahnippah v. Hickel, supra at 619 (Harlan, J., concurring)).

The case before us thus requires close scrutiny for the will in question does have the effect of disinheriting the natural objects of the testator's bounty--i.e., his subsequent-born children. In so doing, it must be noted initially that there is no evidence in the record of overreaching by a beneficiary or of fraud (opinion of July 6, 1978, at 13). Consequently, this ground for disapproval must be rejected. The other considerations however do afford grounds for possible disapproval. The will in this instance is inconsistent with the decedent's existing legal obligation of support and the fact that it does not provide for subsequent-born children may offend public policy. Furthermore, the disinheritance may be the product of inadvertence in that the testator became the parent of two subsequent children after the will was executed. Therefore, the Secretary, or as in this case his representative, "might properly disapprove" the will.

An argument can thus be made for properly disapproving the will in question. The Administrative Law Judge then might have been "right for the wrong reason" in disapproving the will and permitting the state intestate laws to apply. However, I do not believe this is a proper case for reaching such a result. There are equally strong countervailing arguments, facts, and policies against disapproval. Both grounds which support the decision of the Administrative Law Judge can be refuted. First, the testator was already a parent when the will was executed and in the will he provided for his two then existing children.

To be sure, he subsequently fathered two additional children following execution of his will, however, the record suggests that he likewise subsequently drew another will which provided for these, his subsequent children (May 22, 1978, Tr. 8). For whatever his reasons, the testator did not execute this later will providing for these children. It cannot be said then that their omission from the testator's estate was necessarily "inadvertent." His failure to execute this later will, which was allegedly the same in all respects as the February 1, 1973, will now before us except for the inclusion of the subsequent-born children, may have been "intentional." He did after all have this later will available for execution for approximately 6 months (May 22, 1978, Tr. 8).

A second ground for disapproving the Indian will before us rests on the finding that the will contravenes public policy. Policies such as those regarding provision for persons to whom the testator has a legal obligation of support, inheritance by subsequent-born children, or the problems of pretermission.

> At the common law, the birth of a child did not of itself revoke a will previously executed by its parent, and such child did not have any rights in the testator's estate as against the devisee. Also at the common law, a child which the testator had omitted without any intention of excluding it from its share of the testator's estate had no rights in the testator's estate as against devisees or legatees.
>
> * * * * * *
>
> In most states the common-law rule that the subsequent birth of a child did not affect the prior will of its parent has been altered or abrogated by statute.

> While these statutes vary greatly in their details, they may be considered to fall into two general classes: (1) those which provide that the birth of a child revokes the will; and (2) those which provide that an after-born child (and, in many states, also a child omitted from the will, for whom no provision is made, without affirmative provision in the will showing an intention to omit him) shall take as though the testator had died intestate. [Footnotes omitted.]

2 Page on Wills § 21:104 at 527.

The American experience with the problems of subsequent-born children and pretermission has been to change the common law rule of disinheritance not by judicial decree but by legislative action. The enactment of pretermission statutes by state legislatures declared the public policy of their respective forums regarding these issues and dictated how these problems were to be resolved. However, because there is no Federal law respecting these matters and because there exists such wide variety of state statutes on the subject, it would be hazardous indeed to generalize as to what the national public policy is or to speculate as to what the Federal policy should be. Thus, I believe it inappropriate for an Administrative Law Judge in an Indian probate case to disapprove an Indian will on the grounds that it violates public policy by failing to provide for subsequent-born children. That "public policy" has not been identified nor defined and is more properly a subject for legislative (i.e., administrative rulemaking) rather than judicial action. 2/

_____

2/ Whether the offense against public policy is omitting subsequent-born children, pretermitted heirs, or persons to whom the testator owes a legal obligation of support--the fact of the matter remains that Federal policy in these areas is undetermined and it is for those charged with making policy rather than those charged with judicial review to resolve the matter.

Moreover, there are serious practical problems associated with upholding the Administrative Law Judge's decision. The result of the disapproval of the will was that the testator's estate passed according to the State of California's laws of intestate succession. This resulted in not only the subsequent-born children taking their intestate share but also enabled the testator's wife and illegitimate son, both of whom the testator explicitly disinherited under the will in question, to inherit an intestate share as well. This obviously ran counter to the testator's testamentary intent as manifested by his will and subsequent actions. Such a result also runs counter to what Justice Harlan himself recognized in his concurrence in Tooahnippah, supra at 617:

> Without attempting to define with precision the outer limits of the Secretary's authority under the proviso of § 373, I think it clear that it cannot be construed this broadly. First, it must be remembered that the primary purpose of § 373 is to give to the testator, not to the Secretary, the power to dispose of restricted property by a will. In according to the Indian testamentary capacity over restricted property Congress could have only intended to give him the power to dispose of restricted property according to personal preference rather than the predetermined dictates of intestate succession. Such is the essence of the power to make a will. The notion that the Secretary can disapprove a will on the basis of a subjective appraisal--governed by no standards of general applicability--that the disposition is unfair to a person who would otherwise inherit as a legal heir simply cuts too deeply into the primary objective of the statutory grant. [Footnotes omitted.]

Even if the Board upheld the Administrative Law Judge's decision to disapprove the Indian will, other questions and problems would remain, but because of the Board's disposition of this appeal, these questions and problems need not be addressed and I express no opinion

regarding them. Nevertheless, perhaps a brief recitation concerning them is in order so that the seriousness and difficulty posed by the absence of regulations governing this subject may be appreciated.

For example, when the Secretary or his representative disapproves a will, the estate passes under state laws of intestacy and 25 U.S.C. § 371 (1976) regarding inheritance by illegitimate Indian children. The ascertainment of legal heirs under state statutes can create significant problems especially with respect to the inheritance of Indian trust properties. The present case illustrates several potential problems including the inheritance of Indian trust lands by a non-Indian spouse and inheritance by legal heirs contrary to the decedent's wishes. Furthermore, if the disapproval power of the Secretary is interpreted as permitting "partial" versus "total" abrogation of the will, then the decedent may not be considered to have died "intestate." The question then arises as to what law does apply. If under partial abrogation the decedent is deemed to have died testate, there is no provision for applying state law to fill the void; nor can Federal law apply since there is no Federal law (i.e., Federal regulations) on the subject. Only the common law with its harsh rules of disinheritance remains.

This appeal represents a classic example of problems posed for Indian probate by pretermitted heirs. The absence of Federal regulations in this area leaves the Department of the Interior with no satisfactory means to resolve the problem. As this case indicates, an

attempt to disapprove an Indian will solely on grounds of pretermission in order for state intestate provisions to govern would be difficult to justify. As my colleagues emphasize in their opinion and as the Supreme Court observed in Tooahnippah, supra at 610: "The Secretary's task is not always an easy one and perhaps is rendered more difficult by the absence of regulations giving guidelines." I agree and respectfully recommend that such regulations be adopted without delay.

//original signed
Jerry Muskrat
Administrative Judge